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In the Supreme Court of the United States

OCTOBER TERM, 1997

GUADALUPE ROJAS, PETITIONER

v.

LAWRENCE FITCH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Federal Unemployment Tax Act, 26 U.S.C. 3301 *et seq.*, authorizes participating States to exempt a number of employee services from unemployment compensation coverage. 26 U.S.C. 3309(b) and (c). Among those services eligible for exemption are (i) employees of "a church or convention or association of churches," (ii) employees of "an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches," and (iii) the services of "a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order." 26 U.S.C. 3309(b)(1) and (2). The question presented in this case is:

Whether the Federal Unemployment Tax Act's inclusion of employment by religious organizations among the eligible exemptions violates the Establishment Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 127 F.3d 184. The district court's opinion (Pet. App. 14-40) is reported at 928 F. Supp. 155.

JURISDICTION

The court of appeals entered its judgment on October 9, 1997. A petition for rehearing was denied on December 18, 1997. Pet. App. 41-42. The petition for a writ of certiorari was filed on March 18, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Unemployment Tax Act (FUTA), 26 U.S.C. 3301 *et seq.*, establishes a cooperative federal-state program of benefits for unemployed workers. See *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 775 (1981). FUTA imposes an excise tax on employers who pay wages to employees in covered employment. 26 U.S.C. 3301, 3306(c).[1] FUTA also grants covered employers a credit of approximately 90% of the federal tax for their payment of state unemployment taxes if the State's unemployment compensation law meets established federal criteria. 26 U.S.C. 3302(a)-(d)(1), 3304, 3309(a).[2] Participation in the FUTA program is voluntary. Currently, all fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands are participating.

One of the requirements for States to participate in the FUTA program is that the State's unemployment compensation program cover certain types of employment. See 26 U.S.C. 3304(a)(6), 3309(a). Prior to 1970, States could exclude from coverage all of the nonprofit organizations exempted from the federal excise tax by 26 U.S.C. 3306(c)(8). The Employment Se-

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[1] FUTA excepts approximately twenty classes of employment from the federal excise tax, including "service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a)." 26 U.S.C. 3306(c)(8).

[2] Although 26 U.S.C. 3302(c)(1) authorizes a federal tax credit of 90%, Section 3302(d)(1) deems the tax rate for computation of that credit to be 6%, when the rate currently charged is 6.2%. 26 U.S.C. 3301 (authorizing 6.2% rate for calendar years 1988-1998). Consequently, the current credit ceiling is about 87%.

curity Amendments of 1970, Pub. L. No. 91-373, § 104(a)-(b)(1), 84 Stat. 697, changed the law by mandating coverage by participating States of all nonprofit organizations except those specified as eligible for exemption under 26 U.S.C. 3309(b) and (c). See *St. Martin*, 451 U.S. at 776 & n.6. In 1976, Congress amended the list of available exemptions by removing the exemption for some elementary and secondary schools and replacing it with an exemption for certain government employees. See Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 115(b)(1), 90 Stat. 2670; *St. Martin*, 451 U.S. at 777.

At the time of petitioner's claim for benefits, FUTA permitted participating States to exclude seven categories of employees from coverage under their state plans:

(1) employees of churches and affiliated religious organizations;

(2) ministers and members of religious orders;

(3) designated state and local government employees;

(4) employees with impaired physical or mental capabilities who are unable to enter the labor market and who are working in facilities that provide rehabilitation or remunerative work;

(5) participants in federal, state, local, and federally assisted work-relief or work-training programs;

(6) inmates of custodial or penal institutions; and

(7) employees in nonprofit organizations that do not employ at least four employees for at least twenty days a year.

26 U.S.C. 3309(b) and (c).[3]

b. Through the Rhode Island Employment Security Act, Rhode Island elected to exempt, *inter alia*, services performed "in the employ of: (A) A church or convention or association of churches, or (B) an organization which is * * * operated, supervised, controlled, or principally supported by a church or convention or association of churches." R.I. Gen. Laws § 28-42-8(4)(i)(A)-(B) (1995). Other employees exempted by Rhode Island include golf caddies, real estate salespersons and insurance brokers being paid solely on commission, and participants in the Americorps program. *Id.* § 28-42-8(9)-(11), (14) (1995).

2. Except for a temporary hiatus during 1990-1991, petitioner worked as a social worker for the Salvation Army in Providence, Rhode Island from 1988 to 1994. Pet. App. 2. In March 1994, financial constraints compelled the Salvation Army to terminate petitioner's employment. *Ibid.*

Petitioner subsequently applied for unemployment insurance benefits. Her application was rejected because Rhode Island had elected to exempt churches and church-operated organizations from the State's unemployment compensation program. Pet. App. 3. The denial of benefits was affirmed by the Rhode

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[3] The Balanced Budget Act of 1997 added an additional exemption for election workers making less than $1,000 in a calendar year. Pub. L. No. 105-33, § 5405, 111 Stat. 604-605. The Act also authorized States to exempt employees of elementary and secondary schools that are "operated primarily for religious purposes." § 5407, 111 Stat. 605.

Island Department of Employment and Training's administrative appeals process. *Ibid.*

3. In September 1994, petitioner filed suit against Rhode Island seeking invalidation of the State's exemption for church-affiliated entities as a violation of the Establishment Clause, the Equal Protection Clause, and the Rhode Island Constitution. Pet. App. 3-4. The Salvation Army subsequently intervened as a defendant in the action, and the plaintiff later amended her complaint to add claims against the Secretary of Labor on the ground that FUTA's authorization of religious exemptions "was inextricably connected with the Rhode Island statute in question." *Id.* at 19-20.[4]

The district court rejected the defendants' jurisdictional objections to the suit. It held that petitioner had standing to challenge FUTA because Rhode Island could not have exempted the Salvation Army and remained in compliance with FUTA if the federal statute had not authorized the religious exemption. Pet. App. 26-28. The district court also ruled that neither the Tax Injunction Act, 28 U.S.C. 1341, nor the abstention doctrine required dismissal of the suit. Pet. App. 20-26. The district court then ruled that neither FUTA nor the Rhode Island statute ran afoul of the Establishment Clause. *Id.* at 28-37.[5]

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[4] A week after she initiated her federal action, petitioner filed a similar complaint in Rhode Island state court. Pet. App. 19. That action has been stayed pending the outcome of the federal lawsuit. *Ibid.*

[5] The district court also rejected petitioner's equal protection and state constitutional claims. Pet. App. 37-40. Petitioner does not raise either of those arguments in her petition to this Court.

4. The court of appeals affirmed. The court averted the defendants' jurisdictional arguments and proceeded directly to petitioner's Establishment Clause challenge. Pet. App. 6-7. The court of appeals noted that neither the Rhode Island nor the federal religious exemptions stand alone; rather, they are grouped with a number of other, secular exemptions that all serve the common secular purpose of facilitating the government's administration of the unemployment compensation program. *Id.* at 9-10. In particular, the court noted, the religious exemption enhances program administration and protects church autonomy by obviating government review of employment decisions that might have been made, in whole or in part, on religious grounds. *Id.* at 10.

ARGUMENT

Because the court of appeals' decision is correct and consistent with the decisions of this Court and of other courts of appeals, the petition for a writ of certiorari should be denied.

1. Petitioner does not dispute that the court of appeals applied the correct legal test to determine whether FUTA and the Rhode Island unemployment compensation program violate the Establishment Clause. See Pet. 23. The court of appeals applied the three factors identified in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), and adhered to this Court's clarification of the factors' operation last term in *Agostini* v. *Felton*, 117 S. Ct. 1997, 2010, 2015-2016 (1997). See Pet. App. 8-12. Indeed, the decisions of this Court that petitioner relies upon in arguing that the court of appeals erred—*Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989) (plurality opinion); *California* v. *Grace*

Brethren Church, 457 U.S. 393 (1982); and *Agostini*, *supra* (Pet. 23; see also Pet. 11-18)—were all discussed and applied by the court of appeals. See Pet. App. 7-12.[6] Petitioner disagrees only with the outcome of the court of appeals' application of the correct legal test to the specific circumstances of this case. See, *e.g.*, Pet. 8-9. That disagreement, however, presents no issue of broad importance warranting an exercise of this Court's discretionary certiorari jurisdiction. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law.").

2. The decision of the court of appeals is, in any event, correct and consistent with this Court's Establishment Clause precedents. The court of appeals correctly concluded (Pet. App. 9-13) that FUTA's exemption for religious organizations has a secular purpose and a primary effect that neither inhibits nor advances religion. See *Agostini*, 117 S. Ct. at 2010, 2015-2016; *Lemon*, 403 U.S. at 612-613.

a. FUTA's authorization of exemptions for employees of religious institutions has a secular purpose. It is but one of seven exemptions permitted for non-profit organizations—five of which are unrelated to religion. 26 U.S.C. 3309(b)-(c). All of those exemptions share the common secular purpose of facilitating the government's administration of the

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[6] Petitioner's reliance on *Grace Brethren* is particularly puzzling, because the only issue decided in that case was that the Tax Injunction Act barred the schools' action, precluding the Court from addressing the Free Exercise and Establishment Clause challenges to FUTA and its state counterpart. 457 U.S. at 407-419.

unemployment insurance system by excluding employees whose work would create inordinate administrative or accounting difficulties.[7] For example, FUTA permits the exclusion of nonprofit organizations that do not employ at least four persons for twenty days a year, because the additional tax and bookkeeping costs would not be justified. Persons working solely on commission may be excluded because of the accounting difficulties entailed in tracking such wages. See 26 U.S.C. 3306(c) and (i); R.I. Gen. Laws § 28-42-8 (Supp. 1997). The exclusion of employees of religious organizations likewise promotes administrative manageability by eliminating the need for government employees to review employment decisions that could be made on the basis of religious rationales. See Pet. App. 10; see also 26 U.S.C. 3304(a)(10); R.I. Gen. Laws §§ 28-44-17, 28-44-18 (1995) (limiting benefits if employee is "discharged for proved misconduct connected with his or her work," or if employee "leaves work voluntarily without good cause"). The ability to exclude religious organizations allows States to avoid judging whether departures, discharges, or firings based in whole or in part on religious considerations either constitute "good cause" or reflect employee "misconduct."[8]

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[7] Rhode Island law also treats religious employees as just one of fourteen categories of employees the inclusion of which would create administrative burdens for the program. R.I. Gen. Laws § 28-42-8 (Supp. 1997).

[8] Petitioner's complaint (Pet. 22) that FUTA impermissibly distinguishes between religious and secular private schools as a means of advancing religion is thus misplaced. The two are treated differently because only the former presents the administrative difficulty of reviewing religious employment decisions. Likewise, confining FUTA to criteria that focus

Thus, while commission-based insurance brokers, rehabilitation programs, and religious employers all present different types of administrative burdens, their eligibility for exemption serves the common secular purpose of facilitating the smooth operation and administration of unemployment compensation programs. See *Texas Monthly*, 489 U.S. at 14 (subsidy permissible insofar as it "is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end") (footnote omitted). In this regard, FUTA is analogous to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which excludes certain employers from its coverage, 42 U.S.C. 2000e(b), 2000e-1, and, in addition, exempts religious organizations from Title VII's prohibition on religious discrimination in employment, 42 U.S.C. 2000e-1(a). In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327 (1987), this Court held, without dissent, that the statutory amendment creating that religious exemption comported with the Establishment Clause. Contrary to petitioner's contention that governmental exemptions must be formulated without reference to religion (Pet. 18, 22), *Amos* held that *Lemon*'s secular purpose requirement does not mean that "the law's purpose must be unrelated to religion." *Amos*, 483 U.S. at 335; see also *Texas Monthly*, 489 U.S. at 10. Rather, *Amos* held that "it is a permissible legislative pur-

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on the size of the employer, irregular work patterns, or the difficulty of accounting for wages, as petitioner proposes (Pet. 18), would do nothing to address FUTA's concern over having government employees review and evaluate religiously based discharges.

pose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Ibid.* FUTA's religious exemption, like Title VII's, "minimize[s] governmental interference with the [employment] decision-making process in religions." *Id.* at 336. Here, as in *Amos*, "this purpose does not violate the Establishment Clause." *Ibid.*[9]

b. The FUTA exemption likewise does not have the "principal or primary effect," 403 U.S. at 612, of advancing religion. As this Court recognized in *Amos*, "[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." 483 U.S. at 337. The availability of an exemption for religious employers under FUTA in no way advances religion. It promotes the interests of government in program administrability and avoiding entanglement in religious doctrine. See *Agostini*, 117 S. Ct. at 2015 (entanglement concerns are an appropriate component of the effects inquiry). Indeed, a State's adoption of the

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[9] Even assuming, contrary to our argument above, that Congress had some religious purpose in permitting the exemption of religious organizations, it is important to remember that "[a] religious purpose alone is not enough to invalidate an act of a * * * legislature." *Edwards* v. *Aguillard*, 482 U.S. 578, 599 (1987) (Powell, J., concurring) (citing additional cases). "The religious purpose must predominate." *Ibid.*; see also *Wallace* v. *Jaffree*, 472 U.S. 38, 56 (1985). The predominance of secular exemptions in FUTA forecloses any argument that Congress's primary purpose in authorizing the exemptions was to advance religion.

exemption may well make it harder for religious entities to attract quality employees because no unemployment benefits will be available to cushion a discharge. Pet. App. 35 n.5. Furthermore, petitioner does not contend that the exclusion provides religious employers an unfair economic advantage in the commercial, profit-making arena. Cf. *Amos*, 483 U.S. at 349 (O'Connor, J., concurring).

Petitioner makes no argument that the exemption promotes religious indoctrination. See *Agostini*, 117 S. Ct. at 2016. Nor has petitioner presented any evidence that religious organizations have a greater ability now to propagate religious doctrine than they did when FUTA or any of its amendments was enacted. *Amos*, 483 U.S. at 337. Rather, FUTA's religious exemption simply ensures that neither the unemployment compensation programs nor the religious entities are made worse off by the coverage of such entities. See *Walz*, 397 U.S. at 675.

Finally, this case concerns an exemption, not an affirmative government benefit. A statute that classifies benefit recipients on the basis of religion may receive greater Establishment Clause scrutiny than an exemption of religious practitioners that accommodates a secular governmental purpose and protects the autonomy of the religious organization. Compare *Agostini*, 117 S. Ct. at 2014, with *Board of Education of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687, 705-707 (1994); *id.* at 715-716 (O'Connor, J., concurring); *Amos*, 483 U.S. at 335-337; and *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952); see also *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 117 S. Ct. 1590, 1605 (1997) ("[T]here is a constitutionally significant difference between subsidies and tax exemptions."); accord *Walz*, 397 U.S. at

675. Such heightened scrutiny is applied because conditioning the receipt of a benefit on the basis of religion could create an impermissible economic incentive to undertake religious activity. Exemptions, on the other hand, withhold or withdraw a governmental program from the religious sphere and thus are less likely to influence individual religious decisionmaking.

In any event, recipients of exemptions under FUTA and state programs are not defined exclusively by reference to religion: as noted, the exemptions—both secular and religious—are identified by their impact on administration of the program. Petitioner's argument (Pet. 12, 16, 18) that Congress's process of amending FUTA is suspect because it has expanded the workforce covered by FUTA while retaining the religious exemption is misplaced. The changes that have occurred in the national economy, the composition of the workforce, the role of non-profit organizations in the national economy, and in administrative technology have made it possible to expand FUTA's coverage. See Pet. App. 34. None of those developments, however, eliminates the concern about governmental review of religious employment decisions. Congress's legislative judgment in that regard "is a decision entitled to deference, not suspicion." *Amos*, 483 U.S. at 338; see also *Bowen* v. *Kendrick*, 487 U.S. 589, 607 n.11 (1988) (amendment's specific addition of religious organizations as eligible participants in program does not impermissibly advance religion when Congress had a secular purpose for including religious entities).

c. Petitioner is mistaken in arguing (Pet. 8-9, 12-17) that this Court's decisions in *Texas Monthly* and *Walz* mandate that religious exemptions be made

available to a full range of non-religious groups as well as religious organizations. First, the tax exemption at issue in *Texas Monthly* was not grounded "in some secular legislative policy that motivated similar tax breaks for nonreligious activities." 489 U.S. at 14 n.4. FUTA, like the property tax exemption in *Walz*, does authorize exemptions for a variety of secular entities that raise comparable administrability problems for unemployment compensation programs. See *Walz*, 397 U.S. at 673, 674; see also *Texas Monthly*, 489 U.S. at 14 & n.4; Pet. App. 10.

Second, the tax exemption at issue in *Texas Monthly* was confined to the particular religious activity of "promulgating the teaching of the faith" and publishing "writings sacred to a religious faith." 489 U.S. at 5. FUTA does not condition the exemption on any particular speech content or religious activity.

Third, the inquiries into religious doctrine that assessments of employment "misconduct" and "good cause" would entail were FUTA to apply are a far cry from the "routine and factual inquiries" associated with the sales and use taxes at issue in *Texas Monthly*. 489 U.S. at 21; see also *Jimmy Swaggart Ministries* v. *Board of Equalization*, 493 U.S. 378, 396 (1990) (finding it "significant[]" that the routine administrative and recordkeeping requirements of a sales and use tax "do[] not require the State to inquire into the religious content of the items sold or the religious motivation for selling or purchasing the items"); *Hernandez* v. *Commissioner*, 490 U.S. 680, 696-697 (1989) (rejecting argument under which government regulators would be required to distinguish between "secular" and "religious" benefits or services because the regulatory scheme would "be

fraught with the sort of entanglement that the Constitution forbids") (internal quotation marks and citation omitted).

Fourth, *Amos* makes clear that exemptions that "effectuate[] a more complete separation of" religious organizations and the government and that avoid "intrusive inquir[ies] into religious belief," 483 U.S. at 339, need not necessarily "come packaged with benefits to secular entities," *id.* at 338.[10]

3. The court of appeals' decision does not conflict with the ruling of any other court. To the contrary, the court's ruling is the first federal appellate decision to address whether FUTA's authorization of a religious exemption comports with the Establishment Clause.[11] We are, moreover, unaware of any other Establishment Clause challenge to FUTA's religious exemptions currently pending.

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[10] Petitioner's contention (Pet. 10, 17), relying on *United States* v. *Lee*, 455 U.S. 252 (1982), that FUTA impermissibly excludes employees of religious entities from the unemployment compensation program is incorrect. First, *Lee* was a free exercise case, not an Establishment Clause case. *Id.* at 254. Second, the Court specifically noted that some measure of accommodation of religious employers was permissible. *Id.* at 261 ("[A] tax must be uniformly applicable to all, *except as Congress provides explicitly otherwise.*") (emphasis added). Third, petitioner's argument was already rejected in *Amos*. See 483 U.S. at 338-339.

[11] In *St. Martin*, the South Dakota Supreme Court addressed the Department of Labor's determination that parochial schools were subject to unemployment compensation coverage. *In re Northwestern Lutheran Academy*, 290 N.W.2d 845 (1980), rev'd, 451 U.S. 772 (1981). In *Grace Brethren*, a federal district court addressed the constitutionality of applying the unemployment tax scheme to certain religious schools. See 457 U.S. at 399-403.

Petitioner is mistaken in asserting (Pet. 19-20) that the court of appeals' decision conflicts with the Seventh Circuit's opinion in *Metzl* v. *Leininger*, 57 F.3d 618 (1995). In *Metzl*, the Seventh Circuit held that a statute making Good Friday a public school holiday violated the Establishment Clause because there was no secular purpose justifying the legislation. *Id.* at 621-623. In the course of its decision, the court held that the State bore the burden of proving the existence of a secular purpose justifying the statute. *Id.* at 622.

In the present case, the court of appeals observed that "[petitioner] is unable to direct our attention to, nor can we find, any indications in the legislative history of [the FUTA amendments] that suggest an impermissible purpose of advancing religion in general or any particular religion." Pet. App. 9. Petitioner claims that this aspect of the court of appeals' decision conflicts with *Metzl*'s assignment to the State of the burden of production of evidence of a secular purpose. Pet. 19. Petitioner's contention, however, overlooks two significant differences between *Metzl* and the present case.

First, *Metzl* involved a statute that, on its face and in its public interpretation by the governor, embodied an explicit sectarian preference. See *Metzl*, 57 F.3d at 619 (governor proclaims that Good Friday "is a day charged with special meaning to multitudes throughout the Christian world"), 621 ("The state has accorded special recognition to Christianity."), 622 ("On its face, and even without regard to the governor's proclamation, the challenged statute, given the unambiguously sectarian character of Good Friday, promotes one religion over others."). When a statute contains such a facial sectarian preference, the gov-

ernment may bear the duty of producing evidence of a secular purpose. See *Wallace* v. *Jaffree*, 472 U.S. 38, 57-58 (1985) (where statutory text, legislative record, and testimony of sponsor made the "wholly religious character" of the bill "plainly evident," Court noted failure of State to "present evidence of any secular purpose"); cf. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993) (where law burdening free exercise is not neutral or of general application, burden is on government to demonstrate that its interests are compelling); *Amos*, 483 U.S. at 339 (laws discriminating among religions are subject to stricter scrutiny than those benefiting all religions uniformly).

FUTA, however, contains no sectarian preference "on its face," or in "its legislative history" or "its interpretation by a responsible administrative agency." *Edwards* v. *Aguillard*, 482 U.S. 578, 594 (1987). Nor, given the statute's authorization of numerous secular exemptions, can FUTA be said to have a "wholly religious character." *Wallace*, 472 U.S. at 58. Accordingly, the court of appeals correctly adhered to this Court's ordinary rule that the challenger in an Establishment Clause case "must be able to show the absence of a neutral, secular basis" for the statute. *Gillette* v. *United States*, 401 U.S. 437, 452 (1971); *Walz*, 397 U.S. at 676 (burden on person attacking tax exemption); see also *Mueller* v. *Allen*, 463 U.S. 388, 394-395 (1983) (noting courts' ordinary "reluctance to attribute unconstitutional motives to the States, particularly when a plausible

secular purpose for the State's program may be discerned from the face of the statute").[12]

Second, *Metzl* involved the unusual situation where the State chose to hinge its defense on empirical facts about the operation of the school system that were, for the most part, provable only by the State. 57 F.3d at 622. Other courts have subsequently commented upon the uniquely fact-specific and narrow scope of the *Metzl* decision. See *Koenick* v. *Felton*, 973 F. Supp. 522, 529 (D. Md. 1997); *Granzeier* v. *Middleton*, 955 F. Supp. 741, 749-750 (E.D. Ky. 1997). The present case, by contrast, involves the traditional consideration of legislative facts concerning the operation of a statutory program and its administrability in the religious arena. *Metzl* acknowledged that such "legislative facts" are not ordinarily "subject to rules of evidence developed largely for the control of lay juries," but rather "can be settled as a matter of first or general principles." 57 F.3d at 622.

In short, *Metzl* is legally and factually distinct from—not in conflict with—the decision of the court of appeals in the present case.[13]

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[12] In any event, petitioner makes no effort to demonstrate that a different allocation of the burden of production would have changed the outcome of the case.

[13] In addition, the district court addressed, but the court of appeals left unresolved, jurisdictional objections to petitioner's suit based on Article III standing limitations, the Tax Injunction Act, 28 U.S.C. 1341, and the doctrine of abstention. Pet. App. 6-7, 20-28.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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